

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2019

To be argued by RICHARD S. STOLZER

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH GENTILE,
v,
UNITED STATES OF AMERICA,

APPELLANT
APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
United States Attorney for the
Eastern District of New York.

SHIRLEY BACCUS-LOBEL,
RICHARD S. STOLKER,
Attorneys, Department of Justice,
Washington, D.C. 20530.



INDEX

	<u>Page</u>
Issues Presented -----	1
Statement of Facts -----	2
Argument:	
I. INTRODUCTION -----	4
II. THE DISTRICT COURT HAD NO JURISDICTION UNDER 28 U.S.C. 2255 TO VACATE A LAWFULLY IMPOSED SENTENCE ON THE BASIS OF APPELLANT'S CLAIM THAT HE HAD IMPROPERLY BEEN DENIED PAROLE ---	6
III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO CONDUCT AN EVIDENTIARY HEARING ON APPELLANT'S MOTION UNDER 28 U.S.C. 2255 -----	18
IV. APPELLANT IS NOT ENTITLED TO CONSIDERATION OF HIS CLAIM THAT THE SENTENCING COURT RELIED UPON AN ALLEGEDLY IMPROPER FACTOR IN SENTENCING HIM SINCE HE DID NOT RAISE THE MATTER IN THE DISTRICT COURT. THE CLAIM IS IN ANY EVENT WITHOUT MERIT -----	21
Conclusion -----	23
Certificate of Service -----	24

CITATIONS

Cases:

<u>Allen v. United States</u> , 327 F.2d 58 (5th Cir. 1964) -----	17
<u>Andrino v. Board of Parole</u> , 550 F.2d 519 (9th Cir. 1977) -----	16
<u>Billiteri v. United States v. Board of Parole</u> , 541 F.2d 938 (1976) -----	20
<u>Bistram v. Parole Board</u> , 535 F.2d 329 (9th Cir. 1975) -----	21
<u>Cheng Fan Kwok v. Immigration and Naturalization Service</u> , 392 U.S. 206 (1968) -----	7

Cases (CONT'D)

Page

<u>Kills Crow v. United States</u> , F.2d (8th Cir. , No. 1908, decided May 12, 1977) -----	16
<u>Fields v. United States</u> , 542 F.2d 472 (8th Cir. 1976) -----	16
<u>Freeman v. United States</u> , 254 F.2d 352 (D.C. 1958) -----	18
<u>Grasso v. Norton</u> , 520 F.2d 27 (2nd Cir. 1975) -----	9,12,17
<u>Kortness v. United States</u> , 514 F.2d 167 (8th Cir. 1975) -----	16
<u>Lupo v. Norton</u> , 371 F. Supp. 156 (D. Conn. 371 F. Supp. 156 (D. Conn. 1974) -----	21
<u>Mirra v. United States</u> , 379 F.2d 782 (2nd Cir. 1967), <u>cert. den.</u> , 389 U.S. 1002 (1967) -----	18,19
<u>Palmore v. United States</u> , 411 U.S. 389 (1973) ----	7
<u>Ryan v. United States</u> , 547 F.2d 426 (8th Cir. 1977) -----	16
<u>Stinson v. United States</u> , 342 F.2d 507 (8th Cir. 1965) -----	17
<u>Terkildsen v. United States</u> , 481 F.2d 201 (2nd Cir. 1973) -----	22
<u>United States v. Amato</u> , et al., No. 73, Cr. 524 --	4
<u>United States v. Behrens</u> , 375 U.S. 162 (1963) -----	13
<u>United States v. Cifarelli</u> , 401 F.2d 512 (2nd Cir. 1968), <u>cert. den.</u> , 393 U.S. 987 (1968) -----	23
<u>United States v. DiRusso</u> , 535 F.2d 673 (1st Cir. 1976) -----	16
<u>United States v. Doyle</u> , 348 F.2d 715 (2nd Cir. 1965), <u>cert. den.</u> , 382 U.S. 843 (1965) -----	23
<u>United States v. Ellenbogen</u> , 390 F.2d 537 (2nd Cir. 1968), <u>cert. den.</u> , 393 U.S. 918 (1968) -----	7
<u>United States v. Granville</u> , 456 F.2d 1073 (5th Cir. 1972) -----	7

Cases (CONT'D)

Page

<u>United States v. Hendrix</u> , 505 F.2d 1233 (2nd Cir. 1975), <u>cert. den.</u> , 423 U.S. 897 (1975) -----	20
<u>United States v. Hock</u> , 275 F.2d 726 (3rd Cir. 1960) -----	17
<u>United States v. Huss</u> , 520 F.2d 598 (2nd Cir. 1975) -----	16,17,18
<u>United States v. Needles</u> , 472 F.2d 653 (2nd Cir. 1973) -----	20,23
<u>United States v. Robinson</u> , 457 F.2d 1319 (3rd Cir. 1972) -----	7
<u>United States v. Salerno</u> , 538 F.2d 1005 (3rd Cir. 1976) -----	16
<u>United States v. Slutsky</u> , 514 F.2d 1222, 1226-1229 (2nd Cir. 1975) -----	3,15,16
<u>United States v. Somers</u> , 552 F.2d 108 (3rd Cir. 1977) -----	16
<u>United States v. Sweig</u> , 454 F.2d 181 (2nd Cir. 1972) -----	23
<u>United States v. Stein</u> , 544 F.2d 96 (2nd Cir. 1976) -----	8
<u>Williams v. New York</u> , 337 U.S. 241 (1949) -----	22
<u>Williams v. United States</u> , 503 F.2d 995 (2nd Cir. 1974) -----	18

Statutes and Rules Involved:

28 CFR 2.17(b)(2)(B) -----	3
28 CFR 2.20 (1976) -----	3
18 U.S.C. 201(b) -----	2
18 U.S.C. 371 -----	2
18 U.S.C. 4205(b) -----	<u>Passim</u>
18 U.S.C. 4205(c) -----	12
18 U.S.C. 4207 -----	19

Statutes and Rules Involved (CONT'D)

Page

28 U.S.C. 2255 -----	1,3,4,17
Rule 35, Fed. R. Crim. P. -----	2,6,9,13,15

Miscellaneous:

Hearing before Subcommittee 3 of the Comm. on the Judiciary, H. of Repr., 85th Cong., 2d Sess. (April 30, 1958) -----	9
H. Rep. 1946, 85th Cong., 2d Sess. -----	3,4
Remarks of Representative Emanuel Celler, 104 Cong. Rec. 13393 -----	9,10
Remarks of Representative Keating, 104 Cong. Rec. 13393 (July 10, 1958) -----	12
Remarks of Representative O'Neil, 104 Cong. Rec. 13387 (July 10, 1958) -----	13
Report to the Comm. on the Judiciary, H. of Repr., 85th Cong., 2d Sess.; <u>Federal Sentencing</u> Procedures (Feb. 15, 1958) -----	9,10,12
Sen. Rep. 2013, 85th Cong., 2d Sess. -----	9,10
Statement of the House Managers, H. Rep. 2579-----	13

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-2019

JOSEPH GENTILE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

ISSUES PRESENTED

1. Whether the district court was empowered by 28 U.S.C. 2255 to vacate a lawfully imposed sentence in order to correct the decision of the Parole Commission denying appellant parole.
2. Whether the district court abused its discretion in ruling on appellant's motion under 28 U.S.C. 2255 without a hearing.
3. Whether appellant is entitled to present for review his claim that the sentencing court relied upon an improper factor in sentencing him when that claim was not before the district court and whether there is, in any event, any merit to the claim.

STATEMENT OF FACTS

After a jury trial in the United States District Court for the Eastern District of New York, appellant was convicted on three counts of offering and giving a bribe to an Internal Revenue Service Special Agent, in violation of 18 U.S.C. 201(b), and conspiracy, in violation of 18 U.S.C. 371. He was sentenced to concurrent four-year terms of imprisonment and received a \$5,000 fine.^{1/} On direct appeal, this Court affirmed the conviction, 525 F.2d 252 (1975), cert. den., 425 U.S. 903 (1976). Thereafter, the sentence was modified on October 29, 1976 to be served pursuant to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2) [now 18 U.S.C. 4205(b)(2)]^{2/}.

On December 2, 1976, after having served approximately seven months of his sentence, appellant was granted an initial

^{1/} The indictment charged appellant with offering a bribe of \$3,000 to Agent Nicholas Tsosos on June 14, 1972 (count 1), giving such bribe to Tsosos on June 15, 1972 (count 2), offering and giving Tsosos \$1,000 and golf lessons as a bribe (in concert with codefendant Ernest LaPonzina) between June 14 and August 9, 1972 (count 3), and conspiring with LaPonzina to give the latter bribe (count 4). LaPonzina was convicted on counts 3 and 4.

^{2/} Appellant's motion under Rule 35, Fed. R. Crim. P., was filed within 120 days from the denial of certiorari on March 29, 1976.

parole hearing at the Allenwood Federal Prison Camp. At that time he was advised that his salient factor score was 8 and that his offense behavior had been rated as "moderate severity."^{3/} On December 27, 1976 he was notified that his parole application had been designated as an original jurisdiction matter for the following reason:

Pursuant to [28] CFR 2.17 your offense behavior was part of a large scale criminal conspiracy or a continuing criminal enterprise.

See 28 CFR 2.17(b) (2) (B). Following an original jurisdiction hearing held February 3, 1977, the National Commissioners denied appellant parole and continued his case for reconsideration until after he had served one-third of his sentence (i.e., 16 months from May 1976, less any allowances for good time).

In January 1977 appellant filed a motion for correction and reduction of sentence, pursuant to 28 U.S.C. 2255, in the United States District Court for the Eastern District of New York. On January 20, 1977 District Judge Constantino entered

^{3/} Under guidelines published at 28 CFR 2.20 (1976), an offender eligible for parole consideration is rated both in terms of offender characteristics (to produce a salient factor score) and offense behavior. The guidelines indicate a customary range of time to be served, which is predicated upon a combination of the two factors. See United States v. Slutsky, 514 F.2d 1222, 1226-1229 (2nd Cir. 1975). Bribery of a public official is among the offenses rated as moderate severity under the guidelines; a salient score of 8 is in the "good" category. In combination, the two factors indicate a customary range of 16-20 months' incarceration before release.

the following memorandum order denying relief:

In this action petitioner seeks relief under 28 U.S.C. 2255 on the grounds that the United States Board of Parole (hereinafter "Board") relied upon allegedly irrelevant and illegal grounds in denying early parole to petitioner. More specifically petitioner argues that consideration by the Board of an indictment that was dismissed violated his constitutional rights and did not comport with this court's intentions at the time of sentencing.

Since petitioner's contentions are without merit, the motion is denied.

This appeal followed.

ARGUMENT

I. INTRODUCTION

In his motion pursuant to 28 U.S.C. 2255, appellant contended in the district court that the Parole Commission had considered matters which were not before the sentencing court. His argument was that it was improper for the Commission to consider matters which had not been brought to the attention of the sentencing court. The improper matters allegedly considered by the Parole Commission concerned an indictment brought against him for gambling offenses.^{3/}

^{3/} The indictment referred to was returned on March 8, 1973. United States v. Amato, et al., No. 73 Cr. 524 (E.D. N.Y.). Due to problems related to the sealing of wiretap orders in the case, the indictment was dismissed with prejudice on the government's motion on January 18, 1974.

He further argued that an opportunity for resentencing was accordingly appropriate because the district court could not have known that the Commission would consider such matters. In this regard he contends that because the court sentenced him pursuant to the immediate parole eligibility provisions of 18 U.S.C. 4206(a)(2) [now 18 U.S.C. 4205(b)(2)], he would ordinarily have been entitled to parole before or at the completion of one-third of his sentence. Because his initial application for parole was denied, appellant believes the intent of the sentencing court was frustrated and that an opportunity for resentencing is therefore appropriate.

The court below dismissed the petition as wholly without merit. In this Court, appellant contends that this sua sponte dismissal of the petition was improper and that he was entitled to a hearing on the matter. However, as we show in Part II of our argument, the sentencing court was without jurisdiction to consider appellant's complaint directed against the Parole Commission.

Appellant raises an additional claim in this appeal which was not presented to the district court. Although he argued in his petition that the Parole Commission had questioned him and presumably had relied upon the gambling offense which was dismissed and likewise maintained that this was improper because the sentencing court had not considered the dismissed gambling indictment, he now contends that the sentencing court did in fact consider that indictment in

sentencing him. As we discuss in Part IV of our Argument, appellant may not raise this issue for the first time on appeal and it is, in any event, without merit.

II. THE DISTRICT COURT HAD NO JURISDICTION UNDER 28 U.S.C. 2255 TO VACATE A LAWFULLY IMPOSED SENTENCE ON THE BASIS OF APPELLANT'S CLAIM THAT HE HAD IMPROPERLY BEEN DENIED PAROLE.

Appellant contends that the district court erred in refusing to modify or vacate his sentence. To the contrary, however, the court had no jurisdiction to do so.

a. Rule 35, Fed. R. Crim. P.,^{4/} provides that a motion for reduction or modification of a lawful sentence may be brought only within 120 days from imposition of sentence, or receipt of the mandate of the court of appeals, or an order of the Supreme Court denying review or effectively upholding the

4/ Rule 35 provides:

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

judgment of conviction.^{5/} This limitation is jurisdictional; once the 120-day period has run, the district court has no further power to reduce or modify a lawful sentence. As this Court stated in United States v. Ellenbogen, 390 F.2d 537, 540-541 (2nd Cir. 1968), cert. den., 393 U.S. 918 (1968).

The power to reduce [a sentence] is an inherent power of the court and is one aspect of the control which a court retains over a judgment which it has entered * * *. Originally that power was held to expire at the end of the term of court at which the sentence was imposed * * *. But since the adoption of the Federal Rules of Criminal Procedure in 1947, and the abrogation of any effect of the expiration of term of court * * *, the provisions of Rule 35 have governed the expiration of the power to reduce sentences in the federal system. The time limitation stated in Rule 35, first 60 days, now 120 days, is jurisdictional and cannot, under any circumstances, be extended by order of the court. [Citations omitted.]

See also, United States v. Robinson, 457 F.2d 1319 (3rd Cir. 1972); United States v. Granville, 456 F.2d 1073 (5th Cir. 1972).^{6/}

Notwithstanding this jurisdictional limit, appellant claims he is entitled to reconsideration of his sentence. This

^{5/} Certiorari was denied in the present case on March 29, 1976. The period within which a motion under Rule 35 could be brought therefore had expired when appellant filed the present motion in January 1977.

^{6/} "[J]urisdictional statutes are to be construed with precision and with fidelity to the terms by which Congress has expressed its wishes." Palmore v. United States, 411 U.S. 389, 396 (1973), quoting from Cheng Fan Kwok v. Immigration and Naturalization Service, 392 U.S. 206, 212 (1968).

aspect of appellant's claim is not predicated upon an allegation that the sentence is unlawful or that it was imposed in an unlawful manner, in which case he could apply for relief pursuant to Rule 35 or 28 U.S.C. 2255 at any time. United States v. Stein, 544 F.2d 96, 102 n. 7 (2nd Cir. 1976). Rather, appellant would avoid the clear jurisdictional strictures of Rule 35 by reliance upon 18 U.S.C. 4208(a)(2) [now 18 U.S.C. 4205(b)(2)]. He in effect contends that the court below has continuing jurisdiction to reduce a lawful sentence imposed pursuant to that section. He argues that a sentence under that provision manifests the sentencing court's anticipation that ordinarily a prisoner will be released on parole prior to or at the completion of one-third of his sentence.

Of course, appellant has not yet served one-third of his sentence. Nevertheless, he contends that the denial of his initial application for parole frustrated the intention of the sentencing court in imposing a sentence pursuant to section 4205(b)(2) because the Parole Commission questioned him concerning the subject of a dismissed indictment.^{7/} We believe this is a non sequitur. That is, the sentencing court's intention was not frustrated simply because the Parole Commission considered matters not before the district court. In any event,

^{7/} In his petition appellant contended that the Parole Commission should not have considered the matter because the district court did not. Now he complains that the district court may have considered the dismissed indictment (see Part IV of our Argument).

appellant's assumption regarding the sentencing court's expectation with respect to parole treatment of a defendant sentenced under Section 4205(b)(2) is unwarranted. He misapprehends the purpose of that provision. It creates no exception to the jurisdictional restriction imposed by Rule 35.

b. Section 4208(a) of Title 18 [now Section 4205(b)] was intended by the Congress to introduce into federal criminal law the concept of indeterminate sentencing. Grasso v. Norton, 520 F.2d 27, 32 (2nd Cir. 1975). The concern which prompted Congress to provide for indeterminate sentencing at the discretion of the trial court was the wide disparity in sentences received for similar offenses committed by offenders of comparable backgrounds. Congressional study of the problem revealed both excessive sentences and -- just as frequently -- sentences which were too short. H. Rep. 1946, 85th Cong., 2d Sess, pp. 3-4, 6-8; Report to the Comm. on the Judiciary, H. of Repr., 85th Cong., 2d Sess.; Federal Sentencing Procedures (Feb. 15, 1958), pp. 3-5; Sen Rep. 2013, 85th Cong., 2d Sess., pp. 4-6; Hearing before Subcommittee 3 of the Comm. on the Judiciary, H. of Repr., 85th Cong., 2d Sess. (April 30, 1958), pp. 46-49, 55-67, 69; Remarks of Representative Emanuel Celler, 104 Cong. Rec. 13393 (July 10, 1958).^{8/} Thus, the House Report on this legislation

^{8/} Representative Celler was the chief sponsor of this legislation.

concluded that "while disparities seem unjust to the individual offenders who receive these penalties, the chief victim of the consequent effect is the general public, whose welfare has not been safeguarded by sentences which do not adequately or equitably serve the purposes of punishment, deterrence, incapacitation, or rehabilitation." H. Rep. 1946, supra, p. 7.

Congress believed that indeterminate sentencing would achieve a greater uniformity with respect to periods of incarceration by committing the decision as to actual time served to the Board of Parole. The statute in its entirety was intended "to provide Federal judges with additional information, services, and sentencing procedures which [would] enable them to impose upon convicted Federal offenders sentences that are equitable, flexible, and sufficiently long to fulfill more fully their functions of protecting the public safety." H. Rep. 1946, supra, p. 3. See also, Sen Rep. 2013, supra, pp. 4-5, 14; Federal Sentencing Procedures, supra, p. 3; Remarks of Representative Celler, 103 Cong. Record 13231 (July 31, 1957), 104 Cong. Rec. 13392-13393 (July 10, 1958). Thus, the alternatives provided by 18 U.S.C. 4208(a) were intended to enable the federal courts to "give the Board of Parole greater latitude in a particular case" where use of the flexible parole eligibility provisions was deemed appropriate. Statement of the House Managers, H. Rep. 2579, 85th Cong., 2d Sess., p. 2.

It is entirely clear that the Congress did not anticipate that the terms of incarceration actually served would be generally reduced as a result. On the contrary, there was

an expectation -- based largely upon the experiences of the States -- that sentences actually served might be greater as a consequence of indeterminate sentencing, although sentencing disparities were expected to decline as a result. H. Rep. 1946, supra, p. 11; Sen Rep. 2013, supra, p. 5, Remarks of Representative Celler, 104 Cong. Rec. 13392.

Section 4205(b)(1) [formerly Section 4208(a)(1)] permits the sentencing court to specify that a prisoner shall become eligible for parole prior to the expiration of one-third of the sentence, at which time federal prisoners generally become eligible for parole [18 U.S.C. 4205(a) (formerly Section 4202)]. This provision was intended for the more hopeful case, in which a term of incarceration appeared warranted but in which factors available at the time of sentencing indicated a favorable prognosis for early release on parole. H. Rep. 1946, supra, p. 9; Federal Sentencing Procedures, supra, p. 13; Remarks of Representative Celler, 104 Cong. Record 13392 (July 10, 1958); Statement of Senator Hemmings, 104 Cong. Rec. 12752 (July 1, 1958). Section 4205(b)(2), on the other hand, was intended to provide more flexible parole eligibility terms in the doubtful case, that is, the case in which the rehabilitative prospect is poor.^{9/} In such cases, the Congress believed it

^{9/} During debate on the proposed legislation, the view was expressed that under Section 4208(a)(2) a judge could prevent automatic consideration for parole in the case of a seasoned criminal after service of one-third of the sentence by leaving the matter of eligibility entirely to the Board of Parole. Remarks of Representative Keating, 104 Cong. Rec. [FOOTNOTE CONTINUED ON FOLLOWING PAGE]

was providing the district courts with a tool whereby fairly lengthy sentences could be imposed where warranted without thereby extending the term of incarceration which must be served prior to parole eligibility. H. Rep. 1946, supra, p. 3, 9; Remarks of Representative Celler, 104 Cong. Record 13392 (July 10, 1958); Statement of Senator Hennings, 104 Cong. Rec. 12752 (July 1, 1958).^{10/}

Another important feature of this legislation, embodied in 18 U.S.C. 4205(c) [formerly Section 4208(b)], is the provision whereby a court may commit a convicted offender to the custody of the Attorney General for a period of three months (or six months if the court grants an extension) so that a

[FOOTNOTE CONTINUED FROM PRECEDING PAGE]

13393. (July 10, 1958). Section 4205(b)(1) expressly provides that the minimum term at which the prisoner shall become eligible for parole can be no more than one-third of the maximum sentence imposed. There is no similar qualification in Section 4205(b)(2). However, this Court has held that prisoners sentenced under that section can be given no less effective and meaningful parole consideration than prisoners whose eligibility is governed by 18 U.S.C. 4202. Grasso v. Norton, supra.

^{10/} Congress solicited and received 195 responses from federal district judges with respect to these provisions. The response was almost entirely favorable, except that many judges did not believe the legislation went far enough. The view was repeatedly expressed that the minimum one-third service of sentence required to achieve parole eligibility (18 U.S.C. 4202) should be dispensed with entirely on the theory that the Bureau of Prisons and Board of Parole were better situated than district courts to determine when an offender should be released. Federal Sentencing Procedure, supra, pp. 67-68, 70-77, 80-82, 93, 105, 107, 144; Sen Rep. 2013, supra, p. 8; H. Rep. 1946, supra, p. 5.

complete study may be conducted in order to facilitate the court's sentencing function in particularly difficult or complex cases. This provision was intended to modify the effect of Rule 35, F. R. Crim. P., which at that time limited the period within which the sentencing court could reduce or modify a lawful sentence to 60 days following imposition of sentence, or the court's receipt of the mandate of the court of appeals, or entry of any order or judgment of the Supreme Court.^{11/} Recognizing that the courts were powerless to reduce or modify a lawful sentence after this period, Section 4205(c) was intended to permit a more deliberate consideration in exceptional cases.^{12/} H. Rep. 1946, supra, pp. 9-10; Sen Rep. 2013, supra, p. 4; Statement of the House Managers, H. Rep. 2579, supra, p. 2; Statement of Senator Hennings, 104 Cong. Record, 12753 (July 1, 1958); Remarks of Representative O'Neill, 104 Cong. Rec. 13387 (July 10, 1958). Similarly, in 18 U.S.C. 4205(g), Congress has

^{11/} Rule 35 was amended in 1966 to extend the time period to 120 days.

^{12/} Section 4205(c) does not actually operate as an exception to Rule 35 but merely defers sentencing in order to avoid the time limitation of Rule 35. An order committing an offender for study under 4208(b) merely postpones action as to final sentencing. The actual imposition of sentence--from which Rule 35's 120-day period runs -- occurs when the court fixes sentence after having received the results of the study. United States v. Behrens, 375 U.S. 162 (1963).

provided that a district court may, on motion of the Bureau of Prisons, reduce a minimum term of incarceration to the time actually served. Section 4205(b)(2), significantly, contains no language comparable to that of 4205(g) that the court "shall have jurisdiction to act upon the application at any time."

The legislative history of Section 4205(b)(2) clearly provides no support for the contention that a sentence thereunder embodies an expectation of early release on parole or that the provision is an exception to the jurisdictional requirements by Rule 35. Rather, the legislative history makes clear that the enactment was intended not as a measure to enhance the authority of the district court to fix and review a sentence, but as a measure to enable the court, in its discretion, to provide the Parole Commission greater latitude in determining the actual term of incarceration.^{13/} It was intended to bring about greater uniformity with respect to periods of incarceration by committing to the Parole Commission the decision as to actual time served, and "to provide Federal judges with an additional sentencing procedure which [would] enable them to impose upon convicted Federal offenders sentences that are equitable,

^{13/} Effective May 14, 1976 the Board of Parole (referred to in the original legislation) was abolished and replaced by the United States Parole Commission, an independent agency within the Department of Justice. Public Law 94-233, 90 Stat. 219-233, amending 18 U.S.C. 4201-4218.

flexible, and sufficiently long to fulfill more fully their functions of protecting the public safety." H. Rep. 1946, supra, at 3; Remarks of Rep. Celler, supra, 103 Cong. R. 13231 (July 31, 1957); 104 Cong. R. 13392-13393, supra. It is therefore plain that appellant's sentence pursuant to Section 4205(b)(2) did not vest in the sentencing court a continuing jurisdiction for the purpose of reconsidering the sentence in light of the Parole Commission's actions.

c. No contrary result is suggested by this Court's decision in United States v. Slutsky, 514 F.2d 1222 (2nd Cir. 1975). There, defendants brought a timely motion for reduction of sentence under Rule 35, alleging that the sentencing court had been unaware of the parole implications of the sentences imposed. While the case was pending on appeal, the Board of Parole published new guidelines, which this Court believed would operate so as to afford defendants parole consideration substantially different from that which the district court reasonably could have expected at the time of sentencing.^{14/} Accordingly, the Court remanded in order "to allow the district judge an opportunity to reconsider the original sentence in

^{14/} In Slutsky the defendants were sentenced in March 1973. The new parole guidelines, after use on a pilot basis beginning in October 1972, were adopted in November 1973 (38 F. R. 31912) and revised in June 1974 (39 F. R. 20028, 20031).

light of the new circumstances" (514 F.2d at 1227).^{15/} The "new circumstances" thought exceptional in Slutsky are, of course, now the settled and widely recognized practice of the Parole Commission. Unlike the sentencing court in Slutsky, it would be unreasonable to assume that Judge Constantino was not aware of the guidelines published at 28 CFR 2.20, or that their application defeated his probable intent at sentencing. See United States v. DiRusso, 548 F.2d 372 (1st Cir. 1976); Andrino v. Board of Parole, 550 F.2d 519 (9th Cir. 1977). But see United States v. Somers, 552 F.2d 108 (3rd Cir. 1977).

It is clear under this Court's decision in United States v. Huss, 520 F.2d 598, 603-604 (2nd Cir. 1975), that a challenge to the actions and procedures of the Parole Commission must be brought in the district of confinement under 28 U.S.C. 2241,

^{15/} United States v. Salerno, 538 F.2d 1005 (3rd Cir. 1976), is similarly distinguishable. There, in sentencing a defendant under Section 4208(a)(2) in January 1973, the court of appeals reasoned, the district judge's probable expectations were frustrated by implementation of the new guidelines. Id. at 1008-1009. And in Kortness v. United States, 514 F.2d 167 (8th Cir. 1975), there existed a sound jurisdictional basis, apart from §2255, for allowing vacation and reduction of sentence, since the appellant was incarcerated in the district of the sentencing court and habeas corpus jurisdiction therefore existed under 28 U.S.C. 2241. See United States v. DiRusso, 535 F.2d 673, 675 (1st Cir. 1976). Moreover, the Eighth Circuit has consistently restricted the scope of its decision in Kortness to cases in which sentences had been imposed under 18 U.S.C. §4208(a)(2) prior to adoption of the parole guidelines and in which the offender did not receive a hearing at the one-third point of his sentence. See Kills Crow v. United States, F.2d (8th Cir., No. 1908, decided May 12, 1977); Ryan v. United States, 547 F.2d 426 (8th Cir. 1977); Fields v. United States, 542 F.2d 472 (8th Cir. 1976). Thus, while we do not believe Kortness was correctly decided, it does not in any event apply to one in appellant's position.

rather than in the sentencing court under 28 U.S.C. 2255.^{15a/}

The Huss court stated, 520 F.2d at 603:

The §2255 remedy was designed to meet the collateral attack problem, but not to transfer to the sentencing court the entire habeas corpus jurisdiction of the 1867 Act. Indeed, if we were to construe [§2255] as transferring to the sentencing court not only collateral attack litigation, but also litigation over conditions of confinement, we would be creating in reverse the same kinds of administrative difficulties which §2255 was designed to avoid. Certainly §2241 is available to challenge a condition of custody which is "in violation of the Constitution or laws. . . of the United States. . . ." 28 U.S.C. 2241(c)(3). But if by virtue of §2255, such relief is also available before the sentencing court, remote from the usual places of confinement, that court will in most cases be confronted with the same kinds of logistical problems faced by district court prior to [the enactment of §2255 in] 1948 in the district of confinement in collateral attack cases. [Citation omitted.] ^{16/}

^{15a/} Although Huss dealt with a challenge to the procedures of the Bureau of Prisons, the court appeared to recognize that its reasoning applied equally to challenges directed against the Board of Parole. The court stated in this regard:

Cases holding that a §2255 motion is not available to challenge parole board decisions, though not directly controlling, are closely analogous. See, e.g., Stinson v. United States, 342 F.2d 507 (8th Cir. 1965); Allen v. United States, 327 F.2d 58 (5th Cir. 1964); United States v. Hock, 275 F.2d 726 (3rd Cir. 1960).

^{16/} Thus, in Grasso v. Norton, supra, the relief sought was an order directing the Board of Parole to afford prisoners sentenced under Section 4208(a)(2) consideration at least as effective as that afforded to prisoners under 18 U.S.C. 2241.

And in Freeman v. United States, 254 F.2d 352, 353-354 (D.C. Cir. 1958), cited with approval in Huss, the court held:

Although a motion under Section 2255 may be utilized to attack a sentence which is "in excess of the maximum authorized by law," this refers only to the sentence as imposed, as distinct from the sentence as it is being executed. If appellant's sentence is being executed in a manner contrary to law. . . he may seek habeas corpus in the district of his confinement. Section 2255 is not broad enough to reach matters dealing with the execution of sentence.

Appellant's challenge is clearly directed the execution of his sentence and, as such, the court below was without jurisdiction to entertain the claim.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO CONDUCT AN EVIDENTIARY HEARING ON APPELLANT'S MOTION UNDER 28 U.S.C. 2255.

Even assuming jurisdiction existed in this case, the court below did not err in denying relief under 28 U.S.C. 2255 without requiring a response from the government and without conducting an evidentiary hearing. A hearing under Section 2255 is not automatic. Whether a hearing should be held is a matter committed to the sound discretion of the district court. Mirra v. United States, 379 F.2d 782 (2nd Cir. 1967), cert. den, 389 U.S. 1002 (1967). No hearing is required where "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. 2255; Williams v. United States, 503 F.2d 995, 998 (2nd Cir. 1974). There was no need for additional fact-finding, since the sole factual issue concerned the alleged frustration of the intent of the same district judge at the time of sentencing.

This was a matter peculiarly within the knowledge and recollection of Judge Constantino, and no purpose would have been served by conducting an evidentiary hearing. Mirra v. United States, supra.

Nor was a hearing required to determine whether the Parole Commission was entitled to consider conduct which was the subject of a dismissed indictment. That is a question of law. And it is clear that the Commission was entitled to consider the matter, irrespective of whether it was considered by the sentencing court.

The Parole Commission is vested by statute with broad discretion, consistent with due process, as to the information upon which it may rely in granting or denying requests for parole. 18 U.S.C. 4207.^{17/} The Commission was not required to

17/ That section provides:

In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) presentence investigation reports;

(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and

(5) reports of physical mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonable available.

ignore any evidence bearing upon appellant's criminal record. Indeed, if it is appellant's contention that the Commission's consideration of the dismissed indictment was a violation of due process,^{18/} that claim is answered by this Court's decision in Billiteri v. United States Board of Parole, 541 F.2d 938 (1976). There, the district court held that the Parole Board had improperly considered an indictment count charging Billiteri with extortion, since the count had been dismissed, and ordered the Parole Board to release him on parole. This Court reversed. After reviewing its earlier decisions permitting a sentencing judge to consider criminal charges which remained unadjudicated [see United States v. Hendrix, 505 F.2d 1233 (2nd Cir. 1975)] cert. den., 423 U.S. 897 (1975)] or which had been dismissed [see United States v. Needles, 472 F.2d 653 (2nd Cir. 1973)], this Court held that the Parole Board's latitude was, a fortiori,^{19/} no less broad in this regard. 541 F.2d at 1944. See also

^{18/} Appellant's petition appears to be confined to the argument that it was improper for the Commission to consider the indictment because the sentencing court did not do so.

^{19/} This Court also commented in Billiteri that "it is not the function of the courts to repass on the credibility of reports and information received by the Board in making its determination." Id., citing with approval from Brest v. Ciccone, 371 F.2d 981, 982-983 (8th Cir. 1967).

Bistram v. Parole Board, 535 F.2d (9th Cir. 1975); Lupo v. Norton, 371 F. Supp. 156 (D. Conn. 1974).

It is clear that the Parole Commission acted within the scope of the powers delegated it by the statutory scheme and by the district court's order imposing sentence pursuant to 18 U.S.C. 4205(b). Under Section 4205(b), appellant was entitled to no more than early parole consideration, which he was granted. Applying the announced guidelines, an individual with offender characteristics comparable to appellant's, upon conviction for a moderate severity offense, normally could expect to serve 16-20 months in custody; 28 CFR 2.20. And while the Commission for good cause shown was empowered by 18 U.S. 4206(c) to grant or deny parole notwithstanding the guidelines, it was not an abuse of discretion for it to refuse to do so in the present case.

IV. APPELLANT IS NOT ENTITLED TO CONSIDERATION OF HIS CLAIM THAT THE SENTENCING COURT RELIED UPON AN ALLEGEDLY IMPROPER FACTOR IN SENTENCING HIM SINCE HE DID NOT RAISE THE MATTER IN THE DISTRICT COURT. THE CLAIM IS IN ANY EVENT WITHOUT MERIT.

Appellant contends that he was advised at his parole hearing that the presentence report in this case included information relative to the subject of the indictment which was dismissed. Since the court may have considered this information in sentencing him, he argues that the sentence is open to collateral attack and he is entitled to a hearing to determine whether the court did consider the matter and an opportunity to object to its use. Aside from appellant's

failure to present this question to the district court, which would ordinarily foreclose appellate review of the issue, [Terkildsen v. United States, 481 F.2d 201, 204-205 (2nd Cir. 1973)], there are other reasons why appellant's claim must fail.

On appeal from his conviction, appellant maintained that the presentence report improperly contained hearsay as to appellant's involvement in organized crime, loansharking and a description of appellant as a "muscle man". As we pointed out then, the court in the exercise of its discretion made available to appellant the probation officer's presentence report and a hearing was held at which the probation officer was examined by appellant as to these matters. Brief for Appellee, United States v. Gentile and LaPonzina, No. 75-1248, at p. 22, n. 6. Thus, the presentence report was available to appellant and he had an opportunity to challenge its contents. In any event, if the sentencing court had in fact considered evidence which pertained to the dismissed indictment in sentencing appellant, there was no impropriety in his doing so.

In Williams v. New York, 337 U.S. 241 (1949), the Supreme Court held that a sentencing judge is entitled to the fullest information prior to pronouncing sentence, and that due process mandates neither the right of confrontation nor the application of traditional rules of evidence at sentencing. The information available to the sentencing judge need not be "restricted to that given in open court by witnesses subject to cross-examination" (337 U.S. at 250) and may include evidence of crimes for which the defendant has been indicted but

not tried or convicted, United States v. Doyle, 348 F.2d 715 (2nd Cir. 1965), cert. den., 382 U.S. 843 (1965), or even of offenses for which the defendant was acquitted, United States v. Sweig, 454 F.2d 181 (2nd Cir. 1972). As this Court stated in United States v. Doyle, supra, 348 F.2d at 721:

The aim of the sentencing court is to acquire a thorough acquaintance with the character and history of the man before it. Its synopsis should include the unfavorable, as well as the favorable, data, and few things could be so relevant as other criminal activity of the defendant, particularly activity closely related to the crime at hand.

See also, United States v. Cifarelli, 401 F.2d 512, 514 (2nd Cir. 1968), cert. den., 393 U.S. 987 (1968); United States v. Needles, 472 F.2d 652 (2nd Cir. 1973).

CONCLUSION

For the reasons stated, it is respectfully submitted that the court below was without jurisdiction in this matter and that its order should therefore be vacated; in the alternative, the order of the district court denying appellant's motion pursuant to 28 U.S.C. 2255 should be affirmed.

DAVID G. TRAGER,
United States Attorney,
Brooklyn, New York 11201.

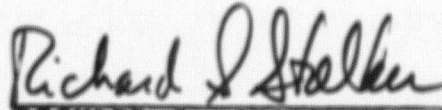
SHIRLEY BACCUS-LOBEL,
RICHARD S. STOLKER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF FOR APPELLEE were served upon appellant by mailing two copies thereof to him at the following address:

Joseph Gentile
P. O. Box 1000
Montgomery, Pennsylvania 17752

on July 25, 1977.



RICHARD S. STOLKER
Attorney for Appellee